

TENTATIVE RULINGS for CIVIL LAW and MOTION

January 22, 2010

Pursuant to Yolo County Local Rules, the following tentative rulings will become the order of the court unless, by 4:00 p.m. on the court day before the hearing, a party requests a hearing and notifies other counsel of the hearing. To request a hearing, you must contact the clerk of the department where the hearing is to be held. Copies of the tentative rulings will be posted at the entrance to the courtroom and on the Yolo Courts Website, at www.yolo.courts.ca.gov. If you are scheduled to appear and there is no tentative ruling in your case, you should appear as scheduled.

Telephone number for the clerk in Department Fifteen: (530) 406-6941

TENTATIVE RULING

Case: **Davis Group v. Murray**
Case No. CV PT 10-39

Hearing Date: **January 22, 2010** **Department Fifteen** **9:00 a.m.**

Davis Group's petition for injunction is **DENIED WITHOUT PREJUDICE**. There is no evidence that the defendants have received notice of this action. A summons has not been issued and a proof of service of the summons, petition, and supporting papers has not been filed.

If no hearing is requested, this tentative ruling is effective immediately. No formal order pursuant to California Rules of Court, rule 3.1312 or further notice is required.

TENTATIVE RULING

Case: **El-Badry v. Morris**
Case No. CV CV 09-782

Hearing Date: **January 22, 2010** **Department Fifteen** **9:00 a.m.**

The motion at bar is moot because the plaintiff has served further supplemental responses to the discovery requests at issue.

The defendants' request for monetary sanctions against Abdalla M. El-Badry and his counsel of record Randy M. Andrus is **GRANTED** in the sum of \$1,540. (Cal. Rules of Court, rule 3.1348.) Plaintiff failed to provide further discovery responses, precipitating the filing of the motion at bar, even though defense counsel had sent plaintiff's counsel a detailed meet-and-confer letter on September 18, 2009, and on October 15, 2009, defense counsel granted the plaintiff a three-week extension of time to provide further discovery responses. The discovery responses at issue were served on plaintiff's counsel on April 8, 2009, over nine months ago! Plaintiff has demonstrated a pattern with this motion and the motion the Court heard on September 21, 2009, of not providing complete discovery responses, serving supplemental responses after a motion to compel is filed, and then claiming that the motion to compel is moot. Such discovery tactics cannot be tolerated.

Defendants' motion for terminating sanctions based on the plaintiff's failure to pay the monetary sanctions ordered by the Court on September 21, 2009, is **DENIED**. The statutes governing the motion at bar do not authorize terminating sanctions in this case. (Code Civ. Proc., §§ 2023.030, 2030.300, subd. (e), 2031.310, subd. (h) and 2033.290.)

If no hearing is requested, this tentative ruling is effective immediately. No formal order pursuant to California Rules of Court, rule 3.1312 or further notice is required.

TENTATIVE RULING

Case: **Fortis Capital, LLC v. Reyes**

Case No. CV G 09-1178

Hearing Date: **January 22, 2010** **Department Fifteen** **9:00 a.m.**

Plaintiff's motion for an order to deem requests for admissions, set one, admitted is **DENIED WITHOUT PREJUDICE**. (Code Civ. Proc., § 2033.280; Dec. of Reyes, ¶¶ 2-4.)

Defendant is directed to serve responses to Plaintiff's requests for admissions, set one, by **February 19, 2010**.

If no hearing is requested, this tentative ruling is effective immediately. No formal order pursuant to California Rules of Court, rule 3.1312 or further notice is required.

TENTATIVE RULING

Case: **Nishi-Schnier v. The Regents of the University of California**

Case No. CV CV 08-2053

Hearing Date: **January 22, 2010** **Department Fifteen** **9:00 a.m.**

This matter is dropped from the Court's calendar.

On December 30, 2009, the Court granted the defendant's *ex parte* application for an order shortening the time for providing notice of a motion to continue the trial and mandatory settlement conference dates. The Court set a hearing for January 22, 2010, for the defendant's motion. No papers have been filed.

If no hearing is requested, this tentative ruling is effective immediately. No formal order pursuant to California Rules of Court, rule 3.1312 or further notice is required.

TENTATIVE RULING

Case: **Paik v. Treon et al.**

Case No. CV PT 09-320

Hearing Date: **January 22, 2010** **Department Fifteen** **9:00 a.m.**

Before the Court are four motions to strike plaintiffs Young and Sue Paik's complaint for malicious prosecution filed by defendants: (1) The Law Firm of Treon, Aguirre & Newman, P.A., Richard T. Treon, Meghann L. St. Thomas, Jim Crook, the Law Office of Jim Crook; (2)

Steven Rorke; (3) James Nolan, and the Law Office of Gardner, Janes, Nakken and Nolan; and (4) River Rock Development, LLC, Hesperia Management, Inc., Hesperia Holdings, LLC, Michelle Church, Thomas Church, William Graham and Michele Sbrocco. The defendants filed notices of joinder in each other's motions and evidence.

The issues this Court must decide are: (1) Is this malicious prosecution action subject to the anti-SLAPP statute (Code Civ. Proc. § 425.16)?; and (2) Have Plaintiffs made a prima facie showing of facts sufficient to substantiate a claim of malicious prosecution?

Resolution of an anti-SLAPP motion requires the court to engage in a two-step process. Initially, the court determines whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. It is the moving defendant's burden to demonstrate that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue," as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

The courts have interpreted Code of Civil Procedure 425.16 as applying to malicious prosecution actions that concern only private disputes between private individuals. (*Jarrow Formulas v. LaMarch* (2003) 31 Cal.4th 728, 738-741.) This action for malicious prosecution concerns a private dispute between private parties. Therefore, this action is subject to the anti-SLAPP statute.

Next, the Court determines whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) "In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]; though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at p. 741.)

The malicious prosecution tort is disfavored both because of its potential to impose an undue chilling effect on the ordinary citizen's willingness to bring a civil dispute to court and because, as a means of determining excessive and frivolous lawsuits, it has the disadvantage of constituting a new round of litigation. (*Wilson v. Parker, Covert & Chidester* (2002) 47 Cal.4th 811, 817.) "Attorneys and litigants have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win..." (*Id.*) Only those actions that "any reasonable attorney would agree are totally and completely without merit" may form the basis for a malicious prosecution suit. (*Id.*) "Suits which all reasonable lawyers agree totally lack merit—that is, those which lack probable cause are the least meritorious of all meritless suits." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382.) "This permissive standard for bringing suits, and corresponding high threshold for malicious prosecution claims, assures that

litigants with potentially valid claims won't be deterred by the threat of liability for malicious prosecution.” (*Id.*)

Based upon the evidence submitted, the Court does not find that “any reasonable attorney would agree” that defendants’ actions were “totally and completely without merit.” It was objectively reasonable for defendants to conclude, based on the agreements, letters, documents and actions of all the parties involved, that they had a tenable breach of contract action concerning the subject Purchase and Sale Agreement. (Plaintiffs Appendix of Evidence 1-139; Dec. of Treon, ¶¶ 1-19; Dec. of Church, ¶¶ 1-35; Dec. of Rorke, ¶¶ 1-27; Dec. of Michele Church, ¶¶ 1-15; Dec. of Tom Church, ¶¶ 1-13; Dec. of William Graham, ¶¶ 1-14; Dec. of Sbrocco, ¶¶ 1-14.)

Finally, the individual and entity defendants argue that advice of counsel is a complete defense to the malicious prosecution action. Good faith reliance on the advice of counsel, after truthful disclosure of all the relevant facts, is a complete defense to a malicious prosecution action. (*Bertero v. National General Corp* (1974) 13 Cal.3d 43, 53-54.) Defendants are not required to prove that they disclosed facts if the facts are otherwise known to their lawyers. (*Graham v. Griffin* (1944) 66 Cal.App.2d 116.) Duty to disclose is limited to known facts, such as statements, events or circumstances. (*Bisno v. Douglas Emmett Realty Fund* 1988 (2009) 174 Cal.App.4th 1534, 1545.)

The Court finds that upon review of the pleadings, the declarations submitted by defendants and their counsel, the exhibits submitted in support of all of the various motions, and the depositions of Mr. Rorke, Mr. Church, and the other individual defendants that, defendants, in good faith relied on the advice of counsel, after truthful disclosure of all the relevant facts. Accordingly, the entity and individual defendants established a complete defense to the malicious prosecution action based on the advice of counsel.

Accordingly, defendants’ motions to strike are **GRANTED**.

The requests for judicial notice are **GRANTED**.